International Carolina Glass Corporation, a Subsidiary of International Aluminum Corporation *and* J. David Wells. Case 11–CA–16123

September 29, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On June 12, 1995, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Carolina Glass Corporation, a Subsidiary of International Aluminum Corporation, Rock Hill, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule a judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Jasper C. Brown, Esq., for the General Counsel.
Beverly A. Carroll, Esq. (Kennedy, Covington, Lobdell & Hickman), of Rock Hill, South Carolina, for the Respondent.
Mitchell C. Payne, Esq., (Payne, Blades & Wellborn), of Rock Hill, South Carolina, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ALBERT A. METZ, Administrative Law Judge. This case was heard at Rock Hill, South Carolina on May 2–3, 1995. The original charge in Case 11–CA–16123 was filed by J. David Wells (Wells), on July 18, 1994.[1] An amended charge was filed on November 16. A complaint issued on November 23. The complaint alleges Respondent violated Section 8(a)(1) of the Act by threatening to close its plant. It is further alleged Respondent violated Section 8(a)(1) and (3) by giving warnings to and discharging employee David Wells.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the oral argument of counsel for the General Counsel and Respondent and the briefs filed by counsel for the Respondent and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation with an office and place of business at Rock Hill, South Carolina, where it is engaged in the manufacture and fabrication of glass products. During the past 12 months Respondent sold and shipped finished products valued in excess of $50,000 from its Rock Hill facility directly to customers located outside the State of South Carolina. The complaint alleges, Respondent admits, and I find that Respondent has been at all times material an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

J. David Wells started work for the Respondent at its Rock Hill facility in February 1992. In the first part of February 1994, Wells and some fellow employees were dissatisfied with working conditions and discussed what to do about their complaints, including contacting a union. It was finally decided that Wells, and fellow employees Chester Webb and James Allen Swift would talk to management.

The employees arranged a meeting with Plant Manager Craig LeDoux, in the later part of February. At the meeting the three told LeDoux of the employees' problems including plant morale, safety, supervisory treatment, and communications. Wells stated that if the problems were not taken care of the employees were considering seeking union representation. As detailed below, LeDoux then discussed unions with the employees. He also promised to look into the problems and get back to the employees. Thereafter, LeDoux met with his supervisory staff on two occasions where the employees' concerns were discussed. Particularly emphasized were poor plant morale and supervisory communication. LeDoux ordered the supervisors to take corrective action.

Subsequent to the employee meeting with LeDoux, Wells received three warnings about his work performance. On April 20, following his third warning, Wells was discharged for ''safety violations.''

B. *Threat to Close the Plant*

The complaint alleges that during the February employee meeting, LeDoux threatened employees that if they selected a union to represent them the Respondent would close the plant. Respondent denies that a threat was made. I find that LeDoux voiced an unlawful threat to close the plant.

Wells did most of the talking for the employees at the February meeting. Wells recalled he said that the employees were dissatisfied and if things were not corrected the employees were talking about getting union representation. LeDoux replied initially that he did not care if the employees wanted a union. LeDoux then went on to talk about his expe-

[1] All dates are in 1994 unless otherwise stated.

rience with unions. Wells testified that LeDoux finally concluded his remarks by stating that if a union came in the Respondent ''would shut the plant down.'' (Tr. 146.)

Employees Webb and Swift corroborated Wells' version of what LeDoux said. Swift, who no longer works for Respondent, remembered the subject of unions coming up. He related that LeDoux said employees could: ''bring a union in, but they would close the door in our face . . . .'' (Tr 17–18.) Chester Webb also recalled LeDoux saying if a union came in the Company could close the doors.

Plant Manager LeDoux testified that Wells only mentioned unions when he said he knew nothing about the ''union thing'' plant employees were talking about. LeDoux states he was surprised to hear the subject of unions mentioned. He conceded he talked about unions thereafter. At one point during the hearing LeDoux denied he said the plant would be closed if the employees chose union representation. However, in a later puzzling explanation LeDoux did admit that he told the employees:

> Well, what I said is, having knowledge of the P&L of our division, and having knowledge of some of the cost associated with a union environment, and knowing our economic condition at the time, I said that eventually, the doors would close. (Tr 216.)

When asked on cross-examination about the subject of shutting the plant, LeDoux admitted the Company had made a profit and was not otherwise contemplating closing.

Based on the demeanor and content of the three employees' testimony, I find them credible in their recitation of the plant closing threat. I additionally note that Webb is still employed by Respondent. His demeanor while testifying impressed me as a sincere and accurate recitation of what he recalled being said. As a current employee it was against his self-interest to testify contra to his employer. Webb had no apparent stake in the outcome of the case. The Board has long recognized that these factors are important in assessing credibility. *Stanford Realty Associates*, 306 NLRB 1061, 1064 (1992); *Natico, Inc.*, 302 NLRB 668, 689 (1991). LeDoux's recollection of what he said is less direct but not far different. I find that LeDoux did state that the plant would close if the employees selected a union to represent their interests. Such a threat is a violation of Section 8(a)(1) of the Act. *American Wire Products*, 313 NLRB 989, 993 (1994).

Respondent implies that Wells was not engaged in protected concerted activities. It is clear that the employees discussed among themselves their thoughts about work problems. They jointly decided to have a meeting with management and at that encounter they expressed workers' concerns about morale and poor supervisory communication. LeDoux thereafter treated the meeting as an expression of widespread dissatisfaction and acted on the employees' complaints. I find that the employees' joint discussions and voiced common complaints at the meeting with LeDoux were protected concerted activity under Section 7 of the Act. I further find that Wells mentioned the possibility of union representation if matters were not corrected. By suggesting this possibility Wells was engaged in union activity that likewise is protected by Section 7 of the Act.

C. *Reaction to Wells' Activities*

The Government contends the Respondent violated the Act when it issued certain warnings to Wells and relied on these for his subsequent discharge. The Respondent denies that its warnings or discharge of Wells were unlawful. I find that both the warnings and the resulting firing of Wells violated Section 8(a)(1) and (3) of the Act.

After the late February meeting with employees, Plant Manager LeDoux held two supervisory meetings to discuss the employees' complaints. Present at these meetings were supervisors LeDoux, David McDaniel, Robert J. Brown, and Johnny Goins. LeDoux thought there may also have been an additional off-shift supervisor present.

Supervisor Brown, who no longer works for the Respondent, testified that during one of the meetings LeDoux stated he was going to ''nip the problem in the bud.'' LeDoux also stated that: ''David Wells is trouble, and we're going to eventually get rid of him.'' (Tr 91.) Brown did not remember any mention of union activity. LeDoux denied that he made any such statements referring to Wells.

None of the other supervisors who were present at this meeting testified. McDaniel no longer works for the Respondent. There was no explanation offered as to why Respondent did not call upon Supervisor Johnny Goins, who still works for the Company, to give his version of events. Under the adverse inference rule when a party has relevant evidence within its control which is not produced, that failure gives rise to an inference that the evidence is unfavorable to the party. *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972). Such an inference is appropriate in this case. I find that the testimony of Supervisor Johnny Goins would have been contrary to LeDoux's denials that he said Wells was trouble and was to be terminated. *International Automated Machines*, 285 NLRB 1122–1123 (1987).

Also indicative of what went on at the supervisory meeting was the testimony of Wells about a conversation he had with Brown. Wells recited that the day following the employee meeting with LeDoux, Supervisor Brown warned him that he was being watched by management. Wells subsequently noticed a surveillance camera was frequently pointed at him.

Supervisor Brown testified that after the supervisory meetings, LeDoux and McDaniel gave him specific instructions about Wells. He was told that he should keep a ''close eye on Mr. Wells.'' (Tr 90.) LeDoux did not testify about this conversation nor offer any explanation why Brown was asked to maintain extraordinary vigilance concerning Wells' activities.

Brown, by his demeanor and testimony, impressed me as a witness who was trying to remember events accurately. His testimony was detailed and his recollection was good. In contrast, the general denials of LeDoux were less impressive. As mentioned, the other supervisor still employed by Respondent did not testify in support of LeDoux's rendition of the supervisory meetings. I find that Brown's version of events is the most credible and that LeDoux made the statements that Wells was trouble and would eventually be terminated. I also find that LeDoux and McDaniel ordered Brown to closely watch Wells.

LeDoux's remarks give insight into the Respondent's motivation for its subsequent course of action concerning Wells. Pursuant to LeDoux's objective that Wells was to be terminated, an elevated scrutiny of his daily activities was begun

using two video cameras. These could be controlled from LeDoux's office. LeDoux admitted that he spent some time devoted to watching Wells on camera.

D. *Disciplinary Warnings Given to David Wells*

1. Warning of March 30[2]

The result of the closer examination of Wells' work was a first warning received on March 30. The warning was for restricting output, specifically, standing around. Supervisor Brown was called into LeDoux's office where he found plant foreman David McDaniel and LeDoux watching Wells on the surveillance cameras. This was the first time that Brown had been called into the office to watch an employee on the monitors.

Wells was observed standing by his oven for about 15 minutes smoking and drinking a soda. LeDoux instructed Brown to discipline Wells. When Brown discussed this with Wells he explained he was waiting for his glass bending oven to reach 600 degrees so 3/8-inch glass would come out as required. While a written notation was made of the event, Supervisor Brown testified that this was not considered a written warning.

There was disputed testimony as to whether it was necessary to watch the oven. Wells gave detailed testimony about the need to observe the oven during a certain special operation (3/8-inch glass or surf board) and manually ''stop it off'' to prevent a quality failure. Wells had performed this special task on about 25 occasions. Wells told how this practice had been arrived at by trial and error under the direction of Plant Foreman David McDaniel who had instructed him to watch the oven and ''stop it off'' as described. McDaniel no longer works for Respondent and did not testify. LeDoux stated his understanding that the machine was fully automated and did not have to be watched. He did not, however, rebut Wells' testimony that he was following McDaniels' instructions in operating the oven properly for 3/8-inch glass. I credit Wells' version that his viewing of the oven during the surf board operation was work he had previously performed in accordance with McDaniel's orders.

I also note that Supervisor Brown testified Wells was an excellent producer whose scrap ratio was extraordinarily low. Additionally, Brown did not dispute Wells' explanation of McDaniel's instructions to observe the oven's operations.

2. Warning of March 31

On the following day Brown was again called into LeDoux's office. As Brown described the scene, LeDoux and McDaniel were there ''with a camera just watching David, and seemed like they was enjoying it.'' (Tr 94.) Wells was seen carrying glass over his head. This is a violation of plant safety rules. LeDoux instructed Brown to give Wells a written warning for this violation. That warning says in part that any further safety violations by Wells will result in a disciplinary layoff. (G.C. Exh. 7.)

At approximately the same time, employee James Swift was caught carrying glass over his head. Supervisor Brown admitted he only verbally warned Swift and told him any further violation of the rule would cause Swift to be written up.

3. Warnings of April 20

On the morning of April 20 supervisor Brown asked Wells to drill some glass. When the task was not completed by later in the day, Brown confronted Wells about the work. Wells replied that the workday was not yet over. Wells did finish the drilling before the end of the workday.

The final warning given Wells concerned the safety of lifting. Brown, for a third time, was called into LeDoux's office to observe Wells via the TV cameras. Wells allegedly was seen not bending his body properly when making lifts. It was also decided that Wells had not tightened the ''ears'' on his lifting belt each time he made a lift. (Ears are velcro flaps on each side of the belt that can be adjusted to tighten or loosen the belt.) LeDoux then decided to fire Wells for ''violating safety rules.'' Wells' termination notice states that: ''Although this violation would normally result in a 1 to 3 day lay-off, when combined with other incidents of insubordination and restricting output, I.C.G. feels that termination of employment at this time is the proper course of action.'' (G.C. Exh. 8.)

Wells testified that he did not need to cinch up as he always wore his belt tightened unless he was on a break. He had never before been warned about adjusting his belt. Respondent did not rebut Wells' assertion about his habit of keeping the belt tightened. Supervisor Brown testified that he did not see employees routinely tighten their belts when lifting. He summarized his observations of employees' practice thus: ''They just put them on and wear them.'' (Tr 106.) He had never before disciplined an employee for not tightening their belt.

E. *Analysis of Wells' Discipline*

The Respondent's employee handbook outlines disciplinary procedures for violations of company rules. (R. Exh. 2.) The Government, citing *Robinson Furniture*, 286 NLRB 1076 (1987), urges that when Respondent disciplined and discharged Wells it changed its disciplinary policy in violation of Section 8(a)(1) and (3) of the Act. I find that *Robinson* is distinguishable from the situation presented here. In *Robinson* there was an announced change in procedure in response to employees' union activities. That is not the case here. Rather I find that the Respondent pretextually and disparately applied its existing policy in order to discriminatorily discipline and discharge Wells because of his union and protected concerted activities.

In sum, the evidence as a whole shows that Respondent engaged in a specific effort to disparately enforce its rules against Wells.

1. The strict surveillance of Wells' work following the February employee meeting in which he mentioned the possibility of union representation. LeDoux's animus expressed in his retort that the plant would close.

2. The remarks of LeDoux that Wells was trouble and would have to be terminated.

3. Wells' credited version of his watching his oven to properly manufacture glass which was not satisfactorily rebutted by Respondent.

[2] In 1993, Wells had received work performance warnings on April 30, December 29 and 30. In January 1994, he received an appraisal but no raise. Wells was appraised again a month later, found to be performing satisfactorily, and given a 25-cent-per-hour raise.

4. Employee Swift who carried glass over his head only received an oral caution. When Wells committed the same offense he received a written warning and the threat of a layoff.

5. Historically Respondent's employees who committed safety violations have been disciplined numerous times, then given suspensions and finally discharged. Richard Austin had violated the Company's rules by not wearing his safety glasses. After his third offense he was given a 1-day suspension. Thereafter, he was observed violating the same rule on five additional occasions. Only after this lenient treatment was he fired. (G.C. Exhs. 15 & 16.) Likewise, James Allen engaged in a violation of not wearing safety equipment. After his second offense he was given a 3-day suspension. (G.C. Exh. 14.)

6. No one had ever been disciplined for not tightening their belts before each lift. Supervisor Brown testified it was routine practice not to tighten belts. Wells always worked with his belt cinched.

The focused surveillance of Wells was designed to find an excuse for his discharge. The issue of this extraordinary scrutiny, although not separately alleged, was fully litigated in conjunction with the warnings. I find that the closer supervision of Wells' work because of his protected activities is a violation of Section 8(a)(1) and (3) of the Act. *Carillon House Nursing Home*, 268 NLRB 589 (1984). The warnings that resulted from Respondent's efforts to find fault with Wells were also motivated by his protected activities. Respondent's discriminatory warnings violate Section 8(a)(1) and (3) of the Act. *Dynamics Corp. of America*, 286 NLRB 920, 921 (1987).

F. *Analysis of the Discharge of David Wells*

General Counsel has the initial burden of establishing a prima facie case. This must be sufficient to support an inference that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support a prima facie showing of discriminatory motivation under Section 8(a)(3) are union activity, employer knowledge, timing, and employer animus. Once such prima facie unlawful motivation is shown, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent goes forward with such evidence, General Counsel ''is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee['s] protected activities.'' *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). ''A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.'' *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

I find that the General Counsel has sustained his burden of showing that the discharge of Wells was a pretext. The Respondent has not demonstrated that Wells would have been discharged but for his protected activities. As detailed above, the true motivation for his firing was Wells' union and concerted protected activities. I find that the Respondent would not have discharged Wells in the absence of his protected activities and that his termination is a violation of 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. By discriminatorily imposing stricter discipline and supervision of Wells' work, disparately disciplining and issuing warnings, and discharging J. David Wells on April 20, 1994, because of his discussion of union representation of employees and engaging in other protected concerted activity, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By threatening to close the plant if employees selected a union to represent them, the Respondent violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged J. David Wells it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, International Carolina Glass Corporation, Rock Hill, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, disparately disciplining, imposing stricter discipline and supervision, issuing warnings, or otherwise discriminating against any employee for supporting any union or engaging in concerted protected activities.

(b) Threatening employees that the Company will close the plant if they select a union to represent them.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Offer J. David Wells immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful discharge, warnings, and closer than normal supervision and notify J. David Wells in writing that this has been done and that evidence of these events will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Rock Hill, South Carolina, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting any union or engaging in concerted protected activities.

We will not threaten our employees that we will close our doors if they have a union represent them.

We will not disparately discipline, impose stricter discipline on, more closely supervise, or issue warnings to our employees because they express an interest in union representation, or because they engage in concerted activities protected by Section 7 of the Act.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer J. David Wells immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits suffered as a result of his discharge, less any net interim earnings, plus interest.

WE WILL remove from our personnel files any reference to J. David Wells' discharge, warnings and the closer supervision he received that were relied on for his discharge and WE WILL notify him, in writing, that this has been done, and that evidence thereof will not be used against him in any way.

INTERNATIONAL CAROLINA GLASS CORPORATION